Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

ROBERT FORD AND BOBBIE SUE FORD,
Petitioners,

v.

GACS, INCORPORATED AND
GENERAL MOTORS CORPORATION,
Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the appellate court apply an incorrect legal standard in its decision in which a punitive damage award was vacated contrary to the holding of this court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* thereby depriving petitioner of his constitutional rights.

II. Are constitutional rights violated by the empty chair defense where one defendant escapes liability in a summary judgment ruling yet the remaining defendant is allowed to blame at trial the dismissed party.

THE PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition the parties are:

Petitioners: Robert Ford and Bobbie Sue Ford, as individuals.

Respondents: GACS, Inc. ("GACS"), a corporation and General Motors Corporation ("GM"), both were parties to the proceedings in the United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit. GACS is owned by a parent corporation, Allied Holdings, Inc. There is no parent or publicly held company which owns 10% of more of GM's stock.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit dated September 7, 2001, is set forth in the Appendix, (265 F.3d 670). The order denying the petition for rehearing on October 16, 2001, is set forth in the Appendix. The opinions of the United States District Court for the Western District of Missouri dated August 6, 1999, and November 30, 1999, are set forth in the Appendix.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Eighth Circuit issued its Decision in this case on September 7, 2001. The motion for rehearing was denied on October 16, 2001. This Petition was timely filed.

CONSTITUTIONAL, STATUTORY, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

Constitutional Issues

1. Seventh Amendment of the United States Constitution

In suit at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

2. Fourteenth Amendment, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of the life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

On March 7, 1998, Robert Ford, (hereinafter "the Petitioner"), a resident of the Eastern District of Missouri, filed his complaint against GACS, Inc., f/k/a Delavan Industries, Inc. (hereinafter "GACS") and General Motors Corporation (hereinafter "GM"), alleging negligence and strict liability under §537.760 R.S.Mo. 1994. Defendants removed the action to the United States District Court of the Western District of Missouri based upon diversity of citizenship pursuant to 28 U.S.C. §1332(a). The Petitioner sought compensatory damages and punitive damages.

On June 29, 1999, GM filed a Motion For Summary Judgment to which the Petitioner filed a response on July 12, 1999. On August 9, 1999, the District Court granted the motion.

On August 30, 1999, the case proceeded to trial with GACS as the sole Defendant as corporate successor to the product manufacturer. A verdict was return in

Petitioner's favor on both the negligence and strict liability counts. The jury also determined that Plaintiffs proved by clear and convincing evidence that punitive damages were justified under Missouri law. GACS' motion for directed verdict on the punitive damages claim was denied. GACS' motion for Judgment Notwithstanding The Verdict was denied on November 30, 1999.

The Respondent, GACS, filed its notice of appeal to the Eighth Circuit Court of Appeals. The Petitioner filed his notice of cross-appeal to the Eighth Circuit Court of Appeals. The District Court's decision was affirmed on the verdict for compensatory damages, reversed on the punitive damages claim and affirmed on the summary judgment in favor of GM on September 7, 2001. Petitioner sought rehearing en banc on September 21, 2001. The motion for rehearing was denied on October 16, 2001.

The Petitioner has filed a Petition for Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

STATEMENT OF THE FACTS

A. GACS Appeal

Plaintiff sustained personal injuries as an automobile transport driver, while "untying" an automobile that was secured to the transport trailer by means of chains and a ratchet mechanism. Plaintiff's trial evidence revealed this ratchet mechanism was known by GACS (and its predecessors) to have injured 622 individuals in 1990 alone.

GACS' trial evidence conceded that, in 1990, there was a 10% chance that, in any given year, a particular driver would be injured while tying or untying a vehicle (494 injuries divided by 4,903 drivers). Thus, even according to Defendant's evidence, every driver had a 1 in 10 chance of being injured each year with this product.

Plaintiff testified that, while tightening a vehicle down during the tightening process, a driver uses both hands on the bar that is used to turn the ratchet. However, during the process of untightening a vehicle, a driver may only use one hand to exert force on the bar, even though the amount of force required is the same (or more). This is because the untightening process requires the bar to be pulled as if the driver were further tightening the chain, so as to relieve the pressure of the ratchet against the pawl or dog, thereby allowing the driver to flip this pawl out of the way, so that the ratchet could be turned a partial turn in the unwinding direction (with the driver's one free hand). This is the process that must be followed unless a quick-release device is designed into the system. Plaintiff's truck was not equipped with a quick-release device. Plaintiff was injured while untying a one-ton four-wheel drive GM truck.

Plaintiffs' expert testified that the ratchet tie-down system was unreasonably dangerous because it required a dangerously high force level to be exerted by the driver in order to operate it. Plaintiffs' expert further testified to her opinion that the auto-hauling industry in general, and GACS in particular were aware of the dangers associated with this ratchet system well before Mr. Ford was injured.

Plaintiffs' expert based her opinions on various reports. One of these was a report (the University of Michigan/Miller report), produced in March of 1979, which concluded that there were 1,184 injuries that occurred during the one year covered by the study. She also testified to the existence of a 1979 patent which patented technology for a safer system. This 1979 patent demonstrated the availability of a safer quick-release mechanism.

Plaintiffs also introduced a 1979 letter received by Defendant to establish Defendant was aware that hundreds of drivers were being injured each year while exerting pressure on the tie-down bar, and that Defendant actually designed a quick-release system to reduce injuries but failed to use it on its trailer. Plaintiffs also proved a motorized torque wrench tie-down system had been created but not used.

Plaintiffs introduced records of the General Motors Haulaway Committee. GACS acknowledged that it was a member of this committee and that its president participated in that committee. These minutes revealed in July 12, 1984, "everyone seemed to have a problem of some sort with the tie-down mechanisms."

In November 17, 1986, the minutes reflected a subcommittee should investigate a quick-release ratchet for safety. The minutes for February 11 and 12, 1987, stated that the tie-down system was very labor-intensive and had a high driver injury frequency.

The October 24, 1991, minutes revealed a presentation was made which pointed out that the tie-down method required drivers to exert high levels of force, and in precarious positions. The presentation cited the loss

of highly-skilled employees to injuries occurring during the tying and untying of vehicles. At the same meeting, a video was shown which demonstrated the use of a quick-release ratchet tie-down system.

Plaintiffs introduced a report by an ergonomic expert retained by GACS to consult regarding the ratchet system and injuries. His report addressed injury statistics for 1990 which reveal 622 injuries. The report indicated that issues of reduced tie-down forces needed to be addressed.

Plaintiffs proved Defendant was aware of the hazards as early as 1979 when it received the University of Michigan/Miller report. Although it acknowledged that one of the purposes of this report was to reduce injuries to automobile transport drivers, Defendant made no attempt to obtain the underlying data analyzed in the report. Defendant admitted this report advised it that the tying and untying of vehicles was the single most error-prone task in the auto-hauling business.

Plaintiffs proved in 1979 Defendant designed a quick-release tie-down system and that the purpose of a quick-release ratchet was to increase the safety of drivers – specifically, in the untying of vehicles. Plaintiffs proved in 1979 the Safety Manager of a related company congratulated Defendant on developing the quick-release mechanism. The Safety Manager stated that, because of this new design, it had finally become a reality that drivers would not have to release the ratchet pawl while exerting pressure on the tie-down bar, and that this would eliminate *hundreds of injuries per year*. Nevertheless, Defendant did not include a quick-release mechanism on the trailer it sold until after 1994. This was so even though Plaintiffs proved in 1991 Defendant was

aware that drivers typically had to exert forces of 100 to 280 pounds on the ratchet and that 39.5 percent of all (drivers) injuries were related to tying down and untying.

Plaintiffs introduced a report from an engineer, Roger Mayne, a professor from the University of Buffalo, who generated a report which reflected measurements of forces used from 180 pounds to 280 pounds. Defendant acknowledged that even 100 pounds would be on the high level of what should be used.

Plaintiffs proved Defendant was also aware that for the year 1990, in the Ryder Auto Carrier Division, there were 622 lost-time injuries while using ratchets. Plaintiffs proved Defendant received these statistics, and threw them into the trash after looking at them.

Defendant also acknowledged that it was a participant in a study conducted by Prof. Drury. Defendant acknowledged that the Drury report stated that there was clearly a need for improved design of the tie-down system.

During the period between 1982 and 1986, Jack Smith was involved in test-loading the vehicles on transports with representatives of Defendant. In connection with this test-loading, Smith and others complained to Delavan about the amount of force that had to be used. Another test-load participant, Ron Jones, testified that when he test-loaded with Defendant he complained of high force levels. He was told by Defendant to wait until the trucks left the test-load area to fully tighten the load so that the manufacturers would not observe what is typically done.

Appeal Against GM

It is undisputed that the trailer which Plaintiffs allege was defectively designed was being used to haul GM automobiles. GM undertook to instruct the manufacturers of trailers used to haul GM cars as to the design of those trailers (and, specifically, the equipment used to tie down cars on those trailers). Plaintiffs presented an internal GM memo dated February 21, 1991, by GM engineers who were reviewing the design of the chain-and-ratchet tie-down system - - specifically, the concerns on the part of trailer drivers that the ratchet pawls were prone to "jumping out" which, in turn, was causing drivers to over-tighten the chains used as tie-downs. In the same memo, GM acknowledged that it would undertake to "instruct" manufacturers to include a special type of ratchet in the design of all their trailers and that it would consider methods by which manufacturers could retrofit existing trailers.

Plaintiffs presented testimony that GM participated in the testing and design of car-hauling trailers. Plaintiffs proved GM stated that it was going to work with the trailer manufacturers to test a new ratchet system and make a decision on the type of device to use.

Plaintiffs proved GM's records established tying down and loosening chains were related to 39.5 percent of injuries (to drivers), and that drivers typically exerted forces up to 280 pounds on tie-down bars. GM's records further noted that, because the current tie-down method required drivers to exert high levels of force, and in precarious positions, "it is strongly suggested that improvements/changes to the tie-down process be considered."

Plaintiffs proved a Director of Safety told GM that one of the topics to be considered by GM was the development of a system for securing vehicles on haulaway equipment that did not require drivers to "use excess force." GM's records revealed GM knew in 1987 tie-down system had a high driver injury frequency.

In its Motion for Summary Judgment, GM acknowledged that, at the time Mr. Ford was injured, he was using a ratchet system which did not have a quick-release device. GM further acknowledged that this quick-release device would eliminate the need for a driver to exert force during the untying process. GM also acknowledged that, according to Plaintiffs, (a) a quick-release device, among other possible options, would have prevented Mr. Ford's injury, and (b) GM prohibited the manufacturers of automobile transports from using an alternative tie-down system.

Plaintiffs submitted specific evidence in response to GM's motion for summary judgment that GM had prohibited alternative tie-down systems, and specifically, that GM prohibited use of a quick-release ratchet. In addition, Plaintiffs submitted the interrogatory responses of GACS in which GACS specifically stated that the ratchet system involved in this case continued to be the only tie-down system then approved for use.

REASONS FOR GRANTING THE WRIT

I. BECAUSE THE APPELLATE COURT REVERSED THE VERDICT AWARDING PUNITIVE DAMAGES BY ANALYZING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE MOVING PARTY, DISREGARDING THE JURY'S FACTUAL DETERMINATION THAT PLAINTIFFS PROVED BY CLEAR AND

CONVINCING EVIDENCE PUNITIVE DAMAGES WERE WARRANTED AND BY SUBSTITUTING ITS RULING FOR THE JURY'S RULING AND THE DISTRICT COURT'S RULING, THIS HONORABLE COURT SHOULD ADDRESS THE APPROPRIATE STANDARD OF CONSTITUTIONAL REVIEW IN CASES HANDED DOWN AFTER *COOPER INDUSTRIES, INC., V LEATHERMAN TOOL GROUP, INC.*

II. BECAUSE THE TRIAL COURT DISREGARDED PLAINTIFFS' EVIDENCE SUBMITTED IN OPPOSITION TO GM'S MOTION FOR SUMMARY JUDGMENT, GRANTED SAID MOTION YET ALLOWED THE REMAINING DEFENDANT TO BLAME GM AT TRIAL CONSTITUTIONAL RIGHTS OF THE PLAINTIFFS WERE VIOLATED WARRANTING CONSIDERATION BY THIS COURT AS TO WHETHER SUCH IS CONSTITUTIONALLY PERMISSIBLE.

A. Reason I Analysis

In *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), this Honorable Court determined that a de novo standard of review should be applied by an appellate court when determining the constitutionality of punitive damages awards when challenged as excessive. In *Cooper Industries*, this Honorable Court reiterated its rejection of the "heightened scrutiny" standard of review for punitive damages awards previously rejected in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

While punitive damages awards are subject to due process review, *Cooper Industries, supra.*, at 149 L.Ed. 688, punitive damages determinations should ordinarily be left to the discretion of the jury. *Day v. Woodworth*, 54 U.S. 363 (1852).

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) this court addressed a constitutional claim that a punitive damages award was excessive. The Court noted factors relevant to an analysis of a punitive damages award include an analysis of whether the Defendant's behavior related to personal safety versus purely economic harm. *Id.*

Here, Plaintiffs' evidence demonstrated a clear pattern of and Defendant's awareness of hundreds of injuries per year. The jury found this and other evidence compelling. Here the jury considered Defendant was told in 1979 its safer design would save hundreds of injuries per year but it did not heed this warning. Here the jury learned Defendant had been repeatedly told by its own experts, customers and test loaders that its design is unsafe. Defendant ignored these warnings as well.

The Appellate Court did not analyze the evidence in the light most favorable to the non-moving party as required. Instead, the Appellate Court, after exonerating GM from liability, allowed Defendant to avoid punitive damages by adopting Defendant's arguments that GM would not allow the safer design. The Appellate Court, in its de novo review, however, ignored the undisputed evidence that Defendant's expert reports, industry reports and recommendations by test load personnel were never shared with GM by GACS. Plaintiffs submit this review is not a de novo review unless that term means a review of the evidence in the light most favorable to defeating a punitive damages award. Such standard is, of course, unprecedented and constitutes a unique standard of extra scrutiny for federal courts sitting in Missouri. The standard does not apply in Missouri state courts where a clear and convincing

standard is applied with no heightened scrutiny on appeal. Because Plaintiffs' claim was removed to federal court the heightened scrutiny standard was applied contrary to Plaintiffs' Equal Protection, Due Process and Jury Trial constitutional rights. There is and never should be a different standard for reviewing verdicts between state and federal courts sitting in the same state.

In the trial court the jury answered the Missouri Supreme Court approved jury instructions in the affirmative by indicating punitive damages were warranted. The jury assessed punitive damages in the amount of $200,000.00. Prior to the submission of the punitive damages claim to the jury Defendant moved for a directed verdict citing insufficient evidence to support a punitive damages award. The trial court denied the motion summarily after hearing the evidence. The Appellate Court, however, disagreed with the trial court and with the jury and vacated the punitive damages award.

Recently this Honorable Court determined that a Court of Appeals should apply a de novo standard when reviewing a district court's determination of the constitutionality of punitive damages awards. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678 (2001). In *Cooper Industries* this Honorable Court rendered it clear that the Court's rejection in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711 (1993) of "heightened scrutiny" of punitive damages awards in still the law of the land. *TXO* at 509 U.S. 456; *Cooper Industries,* supra., at footnote 4. This Honorable Court explained in *Cooper Industries* that there is a legal and proper difference between the standard for reviewing a punitive damages

award as applied to a substantive and procedural standard. In *Cooper Industries* this Honorable Court reiterated that the role of the trial judge is to determine whether the jury's verdict is within the confines of state law, and to determine, by reference to the federal standards under Rule 59 whether a new trial or remittitur should be ordered. *Cooper Industries*, supra., at 121 S.Ct. 1684. The Court further reiterated its prior holdings to reestablish that if no constitutional issue is raised, the role of the Appellate court, at least in the federal system, is merely to review the trial court's determination under an abuse of discretion standard. *Id.* Similarly the Court reiterated that the actual findings made by district courts in conducting an excessiveness inquiry must be accepted unless clearly erroneous but the question whether the finding is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context, and only in this context, is a de novo review of that question appropriate. *Id.* There was no constitutional excessive issue presented yet a de novo review was undertaken by the Appellate Court.

In the present action the trial court determined ample evidence had been presented at trial to justify submission of the punitive damages claim to the jury. When presented with the question, the jury awarded punitive damages. In post-trial motions the trial court once again rejected Defendant's argument that the evidence was insufficient to support a punitive damages award. The Appellate court, however, disagreed with the two decisions of the trial court and with the determination of the 8 members of the jury.

In the Court of Appeals the punitive damages award was vacated four months after this Honorable Court's

decision in *Cooper Industries* yet the Eighth Circuit apparently misconstrued the instructions and teachings of *Cooper Industries*. The Appellate Court based its decision on an analysis under Missouri law which requires a showing of complete indifference or conscious disregard for the safety of others in order to justify the imposition of punitive damages. No constitutional excessive basis for vacating the punitive damages judgment was cited by the Court of Appeals. As such, pursuant to *Cooper Industries*, *supra.*, at 121 S.Ct. 1685, the factual findings by the district court and by the jury must be accepted unless clearly erroneous. If, and only if, a constitutional issue is raised regarding the excessiveness of the award is the de novo review standard applicable. *Id.*

The Court of Appeals acted as a new finder of fact and reviewed the evidence de novo. This de novo review conflicted with this Honorable Court's teachings in *Cooper Industries* and cases cited therein. What's more problematic is that the de novo review by the Court of Appeals was one in which the Court of Appeals reviewed the evidence in the light most favorable to the non-moving party.

A brief analysis of the Appellate Court's opinion clearly establishes that the limited facts analyzed were not reviewed in the light most favorable to the Petitioner and that the facts set forth in the Appellate Court's decision are simply wrong. Page limitations prevent a thorough analysis but a few examples are in order.

The Appellate Court cited as a fact in its de novo review the attempt by the Defendant to develop alternative vehicle securement systems that did not require

excessive force including the quick release ratchet. The Appellate Court stated that Defendant did not implement those other designs for "various reasons" but the "fact that it worked to design a safer system belies the level of reckless indifference or conscious disregard for the safety of others necessary to support an award of punitive damages." Petitioner's evidence with regard to the alternative designs was clear that Defendant made a half-hearted attempt at creating safer alternative designs but did not utilize the safer designs because its sister corporation, its main customer, might lose income through a decreased trailer payload with the safer designs. Petitioner presented evidence that the Defendant's officers and directors received yearly bonuses based on the overall profits of Defendant and its sister corporations thereby providing Defendant with financial incentive to forego and withhold the alternative safer designs. Petitioner's evidence established that in 1979 Defendant developed the quick release alternative safer design. Petitioner's evidence was that Petitioner's injury would not occurred in 1993 if the quick release ratchet had been installed on Petitioner's trailer. Petitioner proved that in 1979 Defendant was specifically and expressly told by the safety director for Plaintiff's employer that the use of the newly developed quick release ratchet would save hundreds of injuries per year. Petitioner submits that the Appellate Court's factual determination that conscious disregard for safety was not shown is simply wrong and can only be supported if the evidence was viewed in the light most favorable to the Defendant.

Further, in addition to the failure by the Defendant to develop and/or employ the use of the alternative safer designs, Plaintiff's evidence established that the Defen-

dant actually withheld the existence of alternative safer designs from others in the industry. Each member of the jury and the trial judge was satisfied that the Plaintiff had shown by clear and convincing evidence the Defendant was guilty of complete indifference to or conscious disregard for the safety of others but the Appellate Court in its review of the evidence in the light most favorable to the Defendant disagreed.

The Appellate Court acknowledged the evidence established Defendant was aware of hundreds of injuries from using the ratchet tie down systems per year. The Appellate Court analyzed and assigned a 10% chance of being injured in a given year as a "number game" which "by itself" did not establish GACS was aware of an unreasonable danger to the driver. Petitioner submits that GACS' awareness and GACS' knowledge are clearly questions of fact and the attempt by the Appellate Court to assign such factual determinations with labels such as "number games" does not overcome the teachings of this Honorable Court with regard to the proper analysis.

In addition to an improper weighing of the evidence, Plaintiffs respectfully submit the Appellate Court also misapplied the law. Indeed the Appellate Court relied upon its own 1993 decision in reaching its conclusion that under Missouri law the safety of a product "must" be weighed against its utility. Since that time, however, the Missouri Supreme Court has rendered it clear that such is not a proper test under Missouri law. *Rodriguez v. Suzuki Motor Corp.*, 995 S.W.2d 47, 65 (Mo.banc 1999) ("this Court again declines the invitation to adopt the reasonable alternative design-risk-utility theory.").

Based upon the above, it is clear that the decision by the Appellate Court vacating the punitive damages award was contrary to the teachings by this Honorable Court, improperly engaged in a de novo review of factual determinations, analyzed the evidence improperly in its de novo review and applied the wrong legal standard under Missouri law.

Petitioner's evidence established that he suffered a career ending injury owing to a proven defective design. The Appellate court, by substituting its factually determinations for those of the jury, deprived the Plaintiff of his right to Trial by Jury. By applying improper legal standards the Appellate Court deprived the Petitioner of his right to Due Process under the law and Equal Protection.

B. Reason II Analysis

If this Court determines that the Petitioners' Writ of Certiorari should be granted, the Court must determine whether it is constitutionally incorrect for a Court to determine that an entity that controls a product design may escape liability for proven defects in the design yet the other Defendant-manufacturer is allowed to blame the dismissed Defendant at trial for regulating the design. The decisions by the lower courts granted and affirmed the summary judgment motion in favor of the non-manufacturer on the basis of lack of duty. But the remaining Defendant was permitted to blame the non-manufacturer at trial for regulating the design. This is in conflict with Petitioners' rights to a trial by jury and Due Process. Moreover, the bigger impact is the effect to product users who effectively are left without a remedy in situations where one company designs a product in compliance with another company's specifi-

cations.

By granting GM's summary judgment motion here the lower courts engaged in a weighing of the evidence. Petitioners submitted ample evidence in the summary judgment proceeding including the testimony of the co-Defendant, GACS. The trial court determined under F.R.Civ.P. Rule 56(c) said evidence was insufficient to allow the claim against GM to proceed to trial but then allowed the remaining Defendants to present essentially the same evidence at trial to establish GM's control or regulation of the product design.

A summary judgment motion is appropriate when there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 437 U.S. 242, 252, 106 S.Ct. 2505 (1986). A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* A fact is "material" if a dispute over it might affect the outcome of the suit under the governing law. *Id.*

The Petitioners' case against GM should have never been disposed of upon a summary judgment motion. Petitioners, by way of deposition, affidavits and other competent evidence, presented a substantial amount of evidence to prove his claim. The Petitioners proved product defect ultimately.

Since the summary judgment was improperly granted in favor of GM, the Petitioners' constitutional right to a jury trial was violated. See *Page v. Work*, 290 F.2d 323, 334 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961). The lower court's allowance by the remaining Defendant, GACS, to then blame GM at trial violated Petitioners' Due Process rights. The jury trial is not merely a

procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury. Consistent with the textual mandate of the federal Constitution's Seventh Amendment that this right to a jury trial be preserved in suits "at common law," this Honorable Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding fathers or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it then existed. *City of Monterey v. Delmonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed.2d 577, 116 S.Ct. 1384 (1995). In order to preserve the right to a trial by jury the Petitioners' entire case should have been heard by a jury.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 239 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 494 U.S. 558 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it." *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). "The right to jury trial in civil cases at common law is a . . . right so

fundamental and sacred to the citizens that it should be zealously guarded by the courts." *Id.*

This Honorable Court has been highly protective of the jury's role: "Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment . . . the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson, supra.* at 255. It would be an undue invasion of the jury's historic function for a court to weigh the conflicting evidence and judge the credibility of witnesses. *Id.* The lower court granted GM's motion based upon an erroneous weighing of the evidence. A genuine issue of material fact existed as to whether GM participated in the design of the product. The lower courts simply ignored Petitioners' direct evidence and concluded, based upon the purported lack of evidence, that GM owned no duty. Petitioners submit the finding of no duty was premised upon a disregard of Petitioners' clear evidence and such finding cannot be allowed to stand.

Multiple decisions from various state Supreme Courts have addressed the constitutionality of the so-called "empty chair" defense in the context of situations where the non-party was never sued but sought by the Defendant to be blamed at trial. Courts holding such improper under state constitutional or statutory provisions include *Bell v. Glock, Inc.*, 92 F.Supp.2d 1067 (D. Mt. 2000); *Wethington v. Wellington*, 781 F.Supp.2d 1379 (S.D. In. 1991); *Wall v. Cherrydale Farms, Inc.*, 9 F.Supp. 784 (E.D. Mi. 1998); *Plumb v. Fourth Judicial District* Court, 279 Mont. 363, 927 P.2d 1011 (Mont.Sup.Ct. 1996); *State ex rel Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d

1062 (Ohio Sup.Ct. 1999); *Richards v. Owens-Illinois, Inc.*, 14 Cal.4th 985, 928 P.2d 1181 (Cal.Sup.Ct. 1997); and *Best v. Taylor Machine Works*, 179 Ill.2d 367, 89 N.E.2d 1057 (Ill.Sup.Ct. 1997). Many of these decisions hold the empty chair defense violative of state constitutional provisions but no case could be found where this Honorable Court has analyzed this significant issue under United States Constitutional provisions. Here, the lower courts allowed for trial tactics which are more egregious than those declared unconstitutional by many state courts. Here Plaintiffs actually sued GM but it escaped liability on summary judgment. The allowance by the lower courts to permit the remaining Defendant to blame GM at trial smacks of constitutional violations. Accordingly, Plaintiff respectfully request review by this Honorable Court.

This Honorable Court must grant this Petition for Certiorari so that it may clarify the standard for a motion for summary judgment where a lower court weighs or disregards evidence, utilizes such as a basis for dismissing one Defendant and then allows the remaining Defendant to blame the dismissed Defendant at trial. Such legal inconsistency begs for redress by this Honorable Court.

CONCLUSION

The Eighth Circuit and the Western District Court of Missouri have placed a high burden of proof upon the Petitioners to overcome a summary judgment motion. The Court should grant *certiorari* to review this important matter, clarify the parties' burdens, order a proper remedy for the Petitioners, reverse the Eighth Circuit's and District Court's opinions, and order that the Petitioners have a constitutional right to jury trial on the claims against GM since there was an improper weighing or disregard of Petitioners' evidence. Additionally, the Court should grant *certiorari* to clarify and establish that under a de novo review of a punitive damages verdict, the Appellate Court may not view the evidence in the light most favorable to the movant.

RESPECTFULLY SUBMITTED,

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